



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

March 30, 2004

Ms. Lynn Rodriguez  
Texas Southern University  
3100 Cleburne Avenue  
Houston, Texas 77004

OR2004-2533

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 198348.

Texas Southern University (the "university") received a request for three items related to the Tobacco Program and Internal Audit Reports. You claim that the requested information is excepted from disclosure under sections 552.108 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You state that the university sought clarification from the requestor of Item 3 of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). You do not inform us that the university had received a response to its request for clarification as of the date you requested this ruling. Because the university is awaiting a response, its deadline for seeking a ruling from this office as to any information responsive to this aspect of the request has been tolled. *See* Open Records Decision No. 663 (1999) (determining that during interval in which governmental body and requestor communicate in good faith to narrow or clarify request, the Act permits tolling of deadlines imposed by section 552.301). We note, however, that "the ten-day deadline is tolled during the [clarification or narrowing] process but resumes, upon receipt of the clarification or narrowing response, on the day that the clarification is received." ORD 663 at 5. Thus, the city's deadlines for requesting a ruling from this office with respect to any information responsive to Item 3 that the city maintains will resume upon the city's receipt of the requestor's response.

Initially, we note that the submitted documents contain information that falls within the purview of section 552.022 of the Government Code. Section 552.022(a)(3) provides that information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is not excepted from required disclosure unless they are made expressly confidential by law. The submitted information includes billing and reimbursement records that fall within the purview of section 552.022(a)(3), and is therefore public information not excepted from public disclosure, unless the information is expressly made confidential under other law. You claim that this information is excepted from disclosure under sections 552.108 and 552.116. We note, however, that these sections are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived.<sup>1</sup>

We note that the section 552.022(a)(3) information includes account numbers. With regard to that information, section 552.136 of the Government Code provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the account number information that the university must withhold under section 552.136.

We now address your arguments for the remaining submitted information. Section 552.116 of the Government Code provides, in pertinent part, as follows:

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<sup>1</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive law enforcement exception). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, or a municipality is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. A governmental body that invokes section 552.116 must demonstrate that the audit working papers are from an audit authorized or required by statute by identifying the applicable statute. You state that the submitted documents constitute audit working papers; however, you have not identified the applicable statute, if any, that authorized or required the audit. Thus, we find that you have not sufficiently demonstrated that the information at issue was prepared or maintained by an institution of higher learning in conducting an audit authorized or required by a statute of this state or the United States. *See* Gov't Code § 552.116(a), (b)(1), (b)(2). Therefore, the university may not withhold the submitted information under section 552.116.

You also claim that the requested information is excepted under section 552.108 of the Government Code, which excepts from required public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime. . . ." Section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 at 2 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is essentially regulatory in nature. Open Records Decision No. 199 (1978). In this instance, you have not adequately demonstrated to this office that the university is a "law enforcement agency" for purposes of section 552.108. *See* Attorney General Opinion MW-575 (1982) (regulatory agency not "law enforcement agency," even though it is charged with duty of enforcing its own statute); Open Records Decision No. 199 (1978).

However, an agency that does not qualify as a law enforcement agency may, under certain limited circumstances, properly claim that section 552.108 protects records in its possession. *See, e.g.,* Attorney General Opinion MW-575 (1982), Open Records Decision Nos. 493 (1988), 272 (1981). If an administrative agency's investigation reveals possible criminal conduct that the administrative agency intends to report to the appropriate law enforcement agency, section 552.108 will apply to information gathered by the administrative agency if its release would interfere with law enforcement. *See* Gov't Code 552.108(a)(1), (b)(1); Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 493 (1988), 272 (1981). Where a non-law enforcement agency is in the custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement entity that it wishes to withhold the information. You state that the information you seek to withhold under section 552.108 involves an ongoing investigation into possible criminal conduct. You further indicate that you have released this information to the Harris District Attorney's Office (the "district attorney"). While you state that you anticipate that further information will be forwarded to the district attorney upon completion of the audits, we note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. - San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). We understand you to assert that the district attorney may pursue prosecution in this matter. However, you fail to state or provide documentation showing that the district attorney has requested that the information you have submitted not be released. Therefore, section 552.108 is inapplicable to the submitted information. Thus, the university may not withhold any portion of the submitted information under section 552.108 of the Government Code.

We note, however, that the submitted records contain information that is confidential by law. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, a public employee's allocation of his salary

to a voluntary investment program or to optional insurance coverage which is offered by his employer is a personal investment decision and information about it is excepted from disclosure under the common-law right of privacy. *See* Open Records Decision No. 600 (1992) (finding designation of beneficiary of employee's retirement benefits, direct deposit authorization, TexFlex benefits, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care related to personal financial decisions). However, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10 (1992). Based on our review of the information at issue, we conclude that the information that we have marked is protected by the common-law right of privacy and must be withheld under section 552.101 of the Government Code.

Finally, we note that section 552.117 of the Government Code may also be applicable to some of the submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For an employee who timely elected to keep his or her personal information confidential, the university must withhold the employee's home address and telephone number, social security number, and any information that reveals whether this employee has family members. The university may not withhold this information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential.

Even if the employee failed to make a timely election under section 552.024, federal law may prohibit disclosure of this employee's social security number. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the university should ensure that no such

information was obtained or is maintained pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the university must withhold some of the information that is subject to section 552.022(a)(3) under section 552.136. We have marked the information that is protected by the common-law right of privacy and must be withheld under section 552.101. For an employee who timely elected to keep his or her personal information confidential, the university must withhold the employee's home address and telephone number, social security number, and any information that reveals whether this employee has family members pursuant to section 552.117(a)(1). The university may not withhold this information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential. Even if a timely election under section 552.024 was not made, a social security number contained in the submitted records may be confidential under federal law. The remaining submitted information must be released to the requestor.<sup>2</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

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<sup>2</sup>Some of the documents marked for release contain or consist of confidential information that is not subject to release to the general public. See Gov't Code § 552.352. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the university receives a future request for this information from an individual other than the requestor or his authorized representative, the university should again seek our decision.

governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 198348  
Enc. Submitted documents

c: Dr. Joseph Jones  
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(w/o enclosures)